

STAFF REPORT

Delta Mercury Control Program Update on the Stakeholder Process

Background

The Sacramento-San Joaquin Delta Estuary (Delta) is impaired due to elevated levels of mercury in fish tissue. In February 2008, staff released a revised total maximum daily load (TMDL) draft technical report and a draft Basin Plan amendment (BPA) staff report. The TMDL report discusses mercury and methylmercury (MeHg) from municipal and industrial wastewater, urban runoff, wetlands, open channels, agricultural return flows, and tributaries. The TMDL report also describes beneficial uses, fish tissue numeric targets, the linkage between methylmercury in water and fish tissue, and methylmercury load reductions required to meet the targets. The BPA staff report proposes a regulatory program to control both total mercury and methylmercury in the Delta.

In April 2008, the Central Valley Water Board opened the hearing for the TMDL and BPA control program and heard public comments. There were many concerns about assigning methylmercury allocations to the various point and non-point sources and the achievability of the allocations and fish tissue objectives. The Board directed staff to work through a stakeholder process to address and resolve stakeholder concerns. In August, staff began working with California State University Sacramento's Center for Collaborative Policy (CCP) to conduct a facilitated stakeholder process. In November-December 2008, CCP held about 60 stakeholder assessment interviews to gather information from a range of potentially affected stakeholders regarding this topic and the appropriateness to convene a stakeholder process. After the interviews, CCP developed a 10-page summary of their Stakeholder Process Assessment (Assessment).

Stakeholder Meetings

On 19 December 2008, CCP convened the first stakeholder meeting, presented the findings of the stakeholder assessment, and discussed options for a stakeholder process. In this meeting and in subsequent meetings, CCP discussed an approach to "bifurcate" the TMDL/Basin Plan amendment so that the process could move forward more quickly and the Board could consider adopting the TMDL/Basin Plan amendment by fall 2009. The purpose of the bifurcated approach is to break the control program into two parts and work with the stakeholders in developing both parts.

The first part is the technical TMDL to meet USEPA requirements (fish tissue objectives and load and waste load allocations) and an adaptive implementation plan framework to meet Porter-Cologne requirements. The goal of the adaptive framework is to identify the necessary steps, but not the specific details, on how

to conduct a long-range adaptive implementation approach. The first part will be presented to the Board in fall 2009.

The second part of the bifurcated TMDL/Basin Plan amendment will be initiated after the Board adopts the first part. After TMDL adoption, there will be a subsequent stakeholder process to engage in a longer term, consensus-seeking approach to design more specific, iterative aspects of an adaptive implementation approach to meet the implementation plan framework. The adaptive implementation plan would include prioritizing and developing control studies for inorganic mercury and methylmercury sources. There was general support among the stakeholders for this approach.

CCP also described a potential approach to structuring and convening a stakeholder group. Specifically, CCP described an approach wherein a large stakeholder group might be convened of representative spokespersons for various Delta and discharger interests, and that smaller topic-specific workgroups would be convened on an as-needed basis to address key topics. These workgroups would report recommendations to the larger group. The larger group would seek consensus among themselves on key topics. These decisions by the stakeholder group would take the form of recommendations to the Board. If consensus is not feasible, the group would report a range of stakeholder perspectives to the Board. CCP also recommended that future meetings be held in various locations in and near the Delta to facilitate more participation from various Delta stakeholders.

Since the initial stakeholder meeting in December, three additional stakeholder meetings have been facilitated by CCP. CCP coordinated stakeholder meetings on 30 January, 19 February, and 26 March in Davis, Sacramento, and Stockton, respectively.

January. Stakeholders identified ten key issues as impediments to completing the development of a mercury control program for the Delta during the CCP's Stakeholder Process Assessment. The 30 January meeting focused on stakeholders and Board staff developing better clarity on the ten key issues and determining whether stakeholder concerns can be addressed in the TMDL, and to have further discussion between Board staff and stakeholders to clarify and resolve a particular issues.

CCP and Board staff provided three documents prior to the 30 January meeting:

- A summary of the key issues (load allocations; wetland management and creation; habitat regulation; total mercury versus methylmercury; addressing and funding legacy conditions; development of equitable study programs; program overlap; regulatory uncertainty in the interim; and offsets).

- A summary of changes to the draft Basin Plan Amendment made by Regional Water Board staff since June 2006 and incorporated into the current version of the draft Basin Plan Amendment dated February 2008.
- A summary of staff's proposed modifications based on recent stakeholder comments that have not yet been incorporated into the draft Basin Plan Amendment.

Board staff also organized a website containing all staff responses to Board Member and stakeholder comments made during the March 2007 and April 2008 Board meetings and scientific peer reviewer comments made on the June 2006 draft staff reports.

About 60 stakeholders attended the 30 January meeting, representing a diversity of interests such as municipal wastewater and stormwater, water management, flood control, irrigated agriculture, public and private wetland managers, fish consumers, environmental, state and federal agencies, conservancies and consultants. The meeting began with opening remarks by David Ceppos of CCP and a regulatory overview by Patrick Morris that identified the regulatory "constraints" that delineate the minimum components of a TMDL control program. Key stakeholder concerns expressed during the regulatory overview included the necessity of allocations and uncertainty about implications for dischargers if goals are not met by proposed dates. The meeting also included a discussion about several of the key issues that stakeholders identified during the Assessment.

While it was intended that all key issues would be discussed at greater length during the January meeting, much of the discussion ultimately focused on the proposed bifurcated process, during which time it became clear that while there was support for the process, there were also concerns about the specific aspects of the framework that need to be addressed before the process moves forward. Concerns included the perceived risks and threats to regulated stakeholders from future enforcement actions, the management of future studies and results, and the desire to not invent an adaptive approach from scratch if feasible examples exist already.

February. Based on the 30 January meeting and discussions CCP had with individual stakeholders after the meeting, CCP focused the 19 February meeting on stakeholders identifying specific ideas for a bifurcated approach. To help stakeholders prepare for the 19 February meeting, CCP and Board staff developed two draft documents to help start the stakeholder process of more concisely defining the components of the bifurcated approach:

- Proposed Bifurcated Delta Mercury Control Program; and
- Preliminary DRAFT Basin Plan Amendment and TMDL Implementation Framework and Time Schedule.

Thirty-eight stakeholders attended the 19 February meeting, representing a similar diversity of interests as the 30 January meeting. The 19 February meeting began with opening remarks by David Ceppos of CCP and Pamela Creedon. The discussion for the rest of the day focused on individual stakeholders suggesting over-arching goals and principles that should guide the control program, and then group discussion and clarification of possible principles. The group also discussed more details about the proposed adaptive framework as proposed for the bifurcated approach. The group advised that the draft principles should be further considered and clarified by a focused workgroup (see section on Workgroups). At the end of the meeting, U.S. Environmental Protection Agency (USEPA) staff described some of their concerns based on their first reading of the above draft documents, for example: the State Compliance Schedule Policy requires schedules for point sources that show point sources are making progress and will achieve allocations as soon as possible; and interim numeric limits should be based on current performance.

March. The next stakeholder meeting was held on 26 March in Stockton at the San Joaquin Farm Bureau. The meeting had progress reports from the Principles, NPDES, and Adaptive Framework workgroups (see the next section). In addition, there was a presentation on adaptive management concepts and how the TMDL could incorporate adaptive management processes. The meeting also included a discussion of how to formalize the stakeholder process, as well as efforts to date to contact underrepresented communities to solicit their participation in the stakeholder process.

Workgroups

As described above, CCP recommended that the Delta MeHg TMDL process would likely benefit from periodically convening smaller stakeholder "workgroups" to concentrate on key topics in a more focused setting. Based on the stakeholder discussions during and after the January and February stakeholder meetings, CCP convened four workgroups to focus on: Principles, Adaptive Framework, NPDES Permit Requirements, and Assurances. The Principles, Adaptive Framework, and NPDES Permit Requirements workgroups reported their findings to the larger group of stakeholders at the 26 March stakeholder meeting. CCP sequenced the majority of the Adaptive Framework and Assurances workgroups' efforts after the Principles and NPDES workgroup efforts were well underway so that the Adaptive Framework and Assurances workgroups' could build upon, rather than duplicate, the other groups' efforts.

Principles Workgroup. The Principles Workgroup was tasked with further developing the principles that should guide the control program, using the preliminary ideas proposed during the during the 19 February stakeholder meeting. The workgroup convened on 4 and 12 March. It was comprised of Lysa Voight (Sacramento Regional County Sanitation District), Rudy Rosen (Ducks Unlimited), Stephen McCord (Larry Walker Associates), Diane Fleck (USEPA), Dan Cloak (Clean Water Action), Tony Pirondini (City of Vacaville),

and Jerry Bruns and Patrick Morris (Central Valley Water Board). The Principles Workgroup provided a draft “outcome document” on 17 March for stakeholder consideration.

The 17 March draft “outcome document” included factual underpinnings to support several of the principles. The Principles Workgroup participants noted that several terms used in the list of principles likely need to be defined (e.g., feasible, reasonable, significant) but did not attempt to develop definitions at this time. In addition, the workgroup participants recognized that not all interests had representatives in the workgroup and attempted to address some interests that were not represented.

At the 26 March stakeholder meeting, the principles were presented to the larger stakeholder group for discussion and suggestions. The Principles Workgroup will reconvene to address the comments and will provide a revised principles list to the larger stakeholder group.

NPDES Workgroup. The NPDES Workgroup was tasked with addressing the key mercury and methylmercury issues that are specifically related to NPDES dischargers. It was comprised of Lysa Voight (Sacramento Regional County Sanitation District), Tony Pirondini (City of Vacaville), Erich Delmas (City of Tracy), Diane Fleck (USEPA), Dan Cloak (Consultant to Clean Water Action), and Patrick Morris (Central Valley Water Board). The group convened on 5 and 23 March. The group is focusing on developing draft Basin Plan language for waste load allocations, compliance schedule for allocations, interim limits, compliance schedule for interim limits, and Phase 1 study requirements. At the 26 March stakeholder meeting, the NPDES Workgroup gave an update to the larger stakeholder group. The next workgroup meeting will take place on 14 April.

Adaptive Framework Workgroup. The Adaptive Framework Workgroup was tasked with identifying key elements that should be included in an Adaptive Framework; finding examples of other adaptive management approaches from other organizations that could be used as models for this effort; and proposing time frames for an Implementation Plan. CCP first met with selected stakeholders on 19 February, then postponed subsequent meetings until preliminary work was completed by the Principles Workgroup. The Adaptive Framework Workgroup convened again on 19 March and included: Sally Liu (The Nature Conservancy); Carolyn Yale and Diane Fleck (USEPA); Terri Mitchell (Sacramento Regional County Sanitation District); Tony Pirondini (City of Vacaville); Rex Bell (PG&E); Erik Ringelberg (Wallace-Kuhl & Associates); Paul Buttner (California Rice Commission); David Ceppos (CCP); and Patrick Morris (Central Valley Water Board). Dave Tamayo (Sacramento County Stormwater Program) has also been involved but could not attend the March discussion. CCP used the draft documents (Proposed Bifurcated Delta Mercury Control Program; and Preliminary Draft Basin Plan Amendment and TMDL

Implementation Framework and Time Schedule) as a starting point for group discussions and expected the group to modify the ideas presented in the documents.

Assurances Workgroup. The Assurances Workgroup has met through one-on-one discussions with CCP. The purpose of the discussions was to identify key assurances and protections that stakeholders need to see memorialized in the future Basin Plan Amendment (or a similar document). Similar to the strategy employed for the Adaptive Framework Workgroup, CCP opted to postpone further discussions with the Assurances Workgroup participants until after work was underway by the Principles Workgroup. It is expected that these assurances, (as prepared by the stakeholders), will enhance stakeholder confidence that future actions regarding the Delta TMDL are equitable to stakeholders and do not represent arbitrary future changes, demands, and enforcement actions. The work of this workgroup will be made available to all stakeholders for review in the near future.

Inclusion of Environmental Justice Communities

In early February, CCP (Dave Ceppos) met with two stakeholders (Andria Venture – Clean Water Action, and Fraser Shilling – UC Davis) that work closely with under-represented, Environmental Justice (EJ) communities. The purpose of this discussion was for CCP to get advice on appropriate next steps to directly work with these underrepresented communities, rather than rely on surrogate groups. Advice provided to CCP included the need to have direct interaction with affected diverse communities, and for the Board to provide financial support to these communities and groups that may not be able to otherwise participate in the proposed Delta TMDL stakeholder process. CCP has since developed a draft strategy to directly engage specific, affected communities and advocates. CCP has conducted several rounds of phone calls to eleven stakeholders that are either general EJ advocates, or direct representatives of potentially affected communities. As of 1 April, CCP had held direct conversations with and/or has received return communication from seven of these representatives. The 26 March stakeholder meeting included a discussion about approaches to maximizing participation from underrepresented communities. CCP expects to deliver a proposal to the Board Executive Officer describing a robust approach to include EJ communities more equitably and effectively. As part of this strategy, CCP is proposing to coordinate and facilitate an initial conference call with these EJ representatives to discuss the proposed strategy and identify next appropriate steps to better include these communities into the Delta TMDL process.

Next Steps

Additional stakeholder meetings have been scheduled for 21 April and 14 May. The 21 April meeting will be held at the Central Valley Water Board office. The location of the 14 May meeting will be determined based on stakeholder needs and available meeting rooms. These meetings may include presentations and

discussions about the scientific issues related to methylmercury production and recent methylmercury study results.

CCP also is working on the following tasks:

- Deliver a proposal to the Board Executive Officer describing a robust approach to include EJ communities more equitably and effectively;
- Prepare a proposed approach to select and "seat" a diverse, representative group of affected stakeholder participants to support the stakeholder process;
- Create a "Critical Path" that outlines the proposed process steps and highlights parallel and/or dependant steps;
- Draft a "Charter" similar to the that prepared by the Irrigated Lands Regulatory Program Stakeholder Workgroup for consideration of the full Delta TMDL stakeholder group at the next meeting;
- Identify and coordinate stakeholders that are likely affected but currently not participating in this process (e.g., stormwater managers, environmental advocates, and underrepresented anglers and fish consumers);
- Develop an online repository (e.g., FTP site or website) where stakeholders can post information relevant to mercury and methylmercury management, production, transport, research, etc.; and
- Develop a series of educational presentations for future stakeholder meetings.

CCP continues to advocate that in the very near future, stakeholders identify a set of participants for a balanced "Stakeholder Committee" of a manageable size (25 to 35 people) that can support more focused discussions on behalf of similar affected parties as well as represent the perspectives of the general public, and include broader public input as well. Stakeholder Committee participants would commit to a series of meetings over 5 months to review the TMDL and develop recommendations for completing the TMDL allocations and an initial, flexible implementation plan. In response to concerns that some stakeholders, particularly environmental justice interests, could be excluded in this format, CCP proposed that the meetings be open to all interested parties and that the Stakeholder Committee representatives commit to addressing the concerns of all meeting attendees.